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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 In re

4 TESCO PLC SECURITIES LITIGATION, 14 Civ. 8495 (RMB)

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New York, N.Y.  
April 21, 2016  
2:00 p.m.

7  
8 Before:

9 HON. RICHARD M. BERMAN,

District Judge

10  
11 APPEARANCES

12 KAHN SWICK & FOTI, LLC  
Attorneys for Lead Plaintiff and Class  
13 BY: KIM E. MILLER  
BRUCE W. DONA

14 WACHTELL, LIPTON, ROSEN & KATZ  
Attorneys for Defendant Tesco  
15 BY: GEORGE T. CONWAY  
16 STEVEN P. WINTER III

17 K&L GATES LLP  
Attorneys for Defendant Broadbent  
18 BY: PETER N. FLOCOS

19 HOGAN LOVELLS US LLP  
Attorneys for Defendant McIlwee  
20 BY: COURTNEY L. COLLIGAN

21 KOBRE & KIM LLP  
Attorneys for Defendant Clarke  
22 BY: DANIELLE L. ROSE

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1 THE COURT: Today is set aside for a fairness hearing.  
2 I'll just give you a little background, so you have a heads-up.

3 First of all, is there anybody here in the audience,  
4 not at counsel table, who wishes to be heard today? And you  
5 would be?

6 MR. KLUG: Yes, your Honor. I'm Stephen Klug, the  
7 named plaintiff in the action.

8 MS. MILLER: He's the lead plaintiff, your Honor, my  
9 client.

10 THE COURT: And somebody else in the back.

11 SPECTATOR: No, I'm not here to appear, your Honor,  
12 just observe.

13 THE COURT: OK. I'll give you a little background.  
14 I'm not going to give you an order today, a final order, but  
15 there is some additional information I'm going to request. I  
16 will then issue a more extensive decision and order in which I  
17 will approve the settlement, and also any accompanying and  
18 related orders, short form order, approving the settlement and  
19 legal fees, etc. The background is this:

20 On March 19, 2015, the Court consolidated six related  
21 class action lawsuits against Tesco and several of its officers  
22 and directors, appointing Mr. Klug as lead plaintiff and the  
23 law firm of Kahn Swick & Foti as lead counsel. On June 18,  
24 2015, lead plaintiff filed a second consolidated amended  
25 complaint alleging that defendants had violated Section 10(b),

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1 including Rule 10b-5, and Section 20(a) of the Exchange Act by  
2 fraudulently misrepresenting earnings and profits. On November  
3 25, plaintiff made an unopposed motion for preliminary approval  
4 of class action status and settlement, which "releases all  
5 defendants from all claims in exchange for \$12 million in  
6 cash." Plaintiffs' counsel stated at the time that they would  
7 move for attorneys' fees not greater than 30 percent of the \$12  
8 million gross settlement fund, plus expenses not to exceed  
9 \$200,000. The expenses of the claims administrator of the  
10 notice and administration of the settlement were not to exceed  
11 \$257,147.06, as I recall.

12 On December 23, 2015, the Court preliminarily approved  
13 the stipulation and the settlement subject to further  
14 consideration at today's fairness hearing and certified a class  
15 for purposes of settlement defined as all persons who purchased  
16 or otherwise acquired American depository receipts, so-called  
17 ADRs, and F-shares of Tesco, from April 18, 2012, and September  
18 22, 2014. Excluded from the class definition are the  
19 plaintiffs in the case entitled Western & Southern Life  
20 Insurance Company v. Tesco, a case that's currently pending in  
21 the United States District Court for the Southern District of  
22 Ohio.

23 On or about February 2, 2016, the multidistrict  
24 litigation panel denied defendant's motion to transfer that  
25 Ohio action to this district. The Court scheduled a fairness

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1 hearing for April 21, 2016, which is today, to determine  
2 whether the settlement is fair, reasonable, and adequate and  
3 should be approved by the Court; to determine also whether the  
4 class should be certified pursuant to Rule 23 of the Federal  
5 Rules of Civil Procedure; and to determine whether a judgment  
6 as provided in the stipulation should be entered; and whether  
7 the proposed plan of allocation should be approved; and  
8 finally, to determine the amount of reasonable fees, time  
9 costs, and expenses that should be awarded to lead counsel.

10 On March 24, 2016, lead plaintiff filed a motion for  
11 final approval of the settlement and plan of allocation and a  
12 separate motion for an award of attorneys' fees and  
13 reimbursement of expenses. Plaintiffs' counsel seeks  
14 attorneys' fees of 20 percent of the \$12 million settlement  
15 fund. This award of 20 percent of the settlement fund would,  
16 according to plaintiffs' counsel, represent a 2.13 multiplier  
17 of the total lodestar based on the services performed by  
18 counsel. Counsel has provided an overview of the hours  
19 performed in this matter but has not provided time sheets to  
20 support those calculations, and that is something that I always  
21 need to take a look at so that I can do what the Second Circuit  
22 calls a cross-check of the lodestar with the fee, percentage of  
23 fee of the award.

24 As of April 18, 2016, the claims administrator, I'm  
25 told, has mailed a total of 111,727 so-called notice packages

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1 to potential class members and received 6,725 proofs of claim,  
2 and that's something I'm going to ask plaintiffs' counsel to  
3 explain in a little more detail: what the significance is of  
4 6,725 proofs of claim in comparison to some 111,000 notice  
5 packages.

6 No objections have been submitted to the settlement,  
7 to the plan of allocation, or to lead counsels' fee and expense  
8 request. The deadline for postmarking any objection was April  
9 5, 2016. This is something I'm also going to ask for further  
10 information on: three requests to opt out of the settlement  
11 were, as I understand it, received by the claims administrator.  
12 However, only one of these requests was accepted as valid, I  
13 guess, is the term. One of the requests was deemed to be  
14 invalid because the individual did not appear to purchase the  
15 securities at issue here. The other claim was deemed to be  
16 invalid because it failed to provide any information to  
17 determine if the individual was in fact a class member.

18 Lead counsel provides as exhibits copies of these  
19 three exclusion requests. The question I'm going to ask lead  
20 counsel to address is whether with respect to the two requests  
21 that were determined to be invalid they had an opportunity to  
22 amend or to supply further information that might substantiate  
23 their application to opt out. In terms of a legal standard,  
24 we're all familiar with the rules that apply to approval of  
25 settlement. You'll see when I finish this order, which won't

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1 be long, that I've reviewed what are called the Grinnell  
2 factors set forth by the Second Circuit. Also with respect to  
3 attorneys' fees, I have reviewed so far the Goldberger factors,  
4 also set forth by the Second Circuit, which support a review  
5 and approval and the amount of attorneys' fees. As I said, I  
6 have no doubt that I will be approving this settlement under  
7 the appropriate Grinnell factors, including, by the way, the  
8 complexity, expense, and likely duration of the litigation; the  
9 reaction of the class to the settlement.

10 I'm also aware, incidentally, that the parties had the  
11 help of a former United States district judge, Layn R.  
12 Phillips, from Oklahoma, and he is a very helpful individual.  
13 Indeed, I think it has been said in one case that if he were  
14 involved in the mediation, it would be considered presumptively  
15 fair. I've also reviewed in my own mind and will set forth in  
16 detail the risks of establishing liability.

17 I'm postponing until I can review the time sheets the  
18 request for approval of attorneys' fees. As soon as you get me  
19 those, I'll be able to do that, but I have gone over the  
20 Goldberger factors at least as far as I could so far. In  
21 addition to the time charges, I am going to ask that some of  
22 the expenses, the larger expenses sought by plaintiffs'  
23 counsel, be documented a little bit further. In particular,  
24 the largest expenses go to or have gone to payment of experts  
25 and consultants in the amount of \$56,523.37. I would like to

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1 know a little bit more about who they were and what they did,  
2 the consultants and experts. There's also a fee of some  
3 \$33,000 to an investigator. I'd also like to know who that was  
4 and a little bit more about that.

5 I'll also get to in that process when I distribute  
6 this order the claims administrator expenses. There is a  
7 statement in here that the claims administrator anticipates  
8 that there will be some additional expenses. I would like to  
9 know what that anticipation is, so to speak, namely, a dollar  
10 amount of how much additional expenses the claims administrator  
11 would like to or intends to submit.

12 Now, I'm also prepared to have counsel, if you wish  
13 to, for the record make a statement in support of your motion.  
14 We can do that right now, if you like, and then I'm happy to  
15 hear from defense counsel.

16 MS. MILLER: Thank you, your Honor. Do you mind if I  
17 go over here?

18 THE COURT: No.

19 MS. MILLER: I promise I won't take long.

20 THE COURT: No, no.

21 MS. MILLER: I wanted to just make a brief  
22 introduction. In addition to my colleague from my office,  
23 Bruce Dona, I actually have a vice president from Epiq, the  
24 claims administrator, here.

25 THE COURT: Great.

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1 MS. MILLER: He came in, I think, from Portland today,  
2 Mr. Cameron Azari, just in case you had questions that sort of  
3 drilled down a little bit more into the process.

4 THE COURT: I will. I'm delighted that he's here.  
5 You can take as much time as you need.

6 MS. MILLER: Your Honor, just to take some of your  
7 questions first, with regard to the time detail, we have it  
8 with us today, and we can hand that up.

9 THE COURT: All right.

10 MS. MILLER: We're ready to hand that up now.

11 THE COURT: OK. As to that, you mean the time sheets,  
12 correct?

13 MS. MILLER: Yes, we have the time sheets.

14 THE COURT: OK.

15 MS. MILLER: Well, we have the individual entries with  
16 the explanation prepared by the attorney or the paralegal or  
17 whoever it was on our staff.

18 THE COURT: Yes.

19 MS. MILLER: As to your questions regarding expenses,  
20 I actually have our backup expense detail and can answer the  
21 questions that you have about those big-ticket items, and if  
22 you want, I can give you something with more detail, but it's  
23 not very pretty right now.

24 Just specifically as to your questions, our  
25 investigator in this case was Gryphon Investigations, and



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1 actually in this case, your Honor, we interviewed, and this was  
2 unusual for us. We interviewed three different investigation  
3 firms in this case. We had some specific concerns as the case  
4 focused on some conduct overseas, and we wanted to make sure we  
5 had an investigation team that was experienced and capable.  
6 Actually, the first firm, who we didn't hire, was based in  
7 London. We ended up going with someone based in the U.S., and  
8 their fee was the full 33,000 and change that's listed on our  
9 expense application.

10 In terms of our experts and consultants, there were  
11 three. The first was FailSafe CPA. We worked with the head of  
12 that firm. His name is Keith Mautner. We found Keith  
13 specifically because unlike cases that I've done for the last  
14 20 years involving GAAP, this case fell under IFRS, the  
15 international forensic accounting standards; IFRS is the  
16 abbreviation, even though it doesn't match the words. Keith  
17 had substantial experience in that regard, and if you look to  
18 our complaint, there are some pretty detailed charts in there  
19 that address inventory, profits, commercial income. All of  
20 that stuff was prepared in consultation with Keith who spent a  
21 substantial amount of time investigating the public filings and  
22 discussing issues with us and doing research on the related  
23 provisions of IFRS, and I believe his portion of the consulting  
24 expenses, which I apologize we grouped them together, was  
25 31,902.75, and then two other consultants, both economic and

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1 damages consultants. One was Mulholland & Co., which just did  
2 a brief amount of work amounting to about \$4,978.12. And then  
3 we also retained Global Economics Group and worked with Chad  
4 Coffman. In that regard, Mr. Coffman assisted us with our  
5 mediation, and actually both sides had economics consultants  
6 who submitted some documentation that Judge Phillips reviewed,  
7 and actually I believe their expert came along and gave a  
8 presentation in the room and ours was on the phone, and they  
9 also talked to each other. So they were very involved, and  
10 both of these consultants, these economic consultants, that we  
11 used helped us to assess. We have a figure in our papers  
12 saying our maximum damages that we thought we could recover if  
13 we survived through trial and appeals, \$48.1 million. They're  
14 in alignment on that figure, and we recovered 25 percent of  
15 that. So Mr. Coffman of Global Economics Group has the balance  
16 of those consulting expenses. I have here two bills. I can't  
17 add it up in my head, but I believe it amounts to approximately  
18 \$20,000. Those were the main breakdowns, and of course Judge  
19 Phillips's firm is on there as well as a separate category.

20 THE COURT: While you're on that, for the record, I  
21 think it would be useful to have it historically. How did you  
22 find Judge Phillips, and how did that process come about, and  
23 where did it take place? I think there were written  
24 submissions, as you suggest. Did you also all meet with him?  
25 Tell us more about that process.

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1 MS. MILLER: Right. With respect to Judge Phillips's  
2 involvement, both my firm and Mr. Conway's firm have worked  
3 with him previously in other matters. And Mr. Conway reached  
4 out to me while the motion to dismiss was pending. We wanted  
5 someone who has broad experience with these issues. It was  
6 particularly, maybe not the biggest case, but a pretty  
7 complicated one, so we agreed right off the bat to try to get  
8 on his schedule, and he actually came to New York and we  
9 mediated. We had a full-day mediation, and again they brought  
10 people from the company and they also brought their forensic  
11 consultant, and we had Mr. Coffman on the phone.

12 THE COURT: This is defendants.

13 MS. MILLER: Yes, that was. I believe we reached the  
14 settlement in the evening hours, your Honor. Prior to the  
15 mediation, we exchanged submissions. I wanted mine to be  
16 confidential, but I was talked out of it by Judge Phillips and,  
17 I think, Mr. Conway, so we exchanged those. We also did reply  
18 submissions, and I think there might have been also a  
19 supplemental submission relating to damages. There was an  
20 issue about the number of shares outstanding, what was the  
21 float. We had a figure that was what the maximum possible  
22 float could be. Mr. Conway had more information that was not  
23 publicly available, which led us to conclude after we were able  
24 to vet that documentation that our number was too high and that  
25 the actual number was 65 million. All we knew is that it was

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1 somewhere south of 250 million, but we didn't know, so that  
2 impacted our damage figure and our analysis and was something  
3 that was addressed at the mediation.

4 I know your Honor has said that you intend to approve  
5 the settlement. We're very proud of the settlement, and we  
6 believe it readily meets all of the relevant factors under  
7 Grinnell, but I would like to just point out a couple of things  
8 with regard to the complexity of the litigation and the risks  
9 faced in this case. As I mentioned, we specifically searched  
10 for, and it wasn't easy to find him, a forensic accountant who  
11 was specifically versed in IFRS matters, and our complaint  
12 shows those complex issues pleaded in accordance with the PSLRA  
13 and 9(b). We did our very best in that regard. Those issues  
14 were quite difficult and complicated, but we also faced a very  
15 difficult preliminary legal issue under Morrison, and this was  
16 an issue that was brought to your Honor's attention at our  
17 initial status conference.

18 We had a conference at which we were discussing  
19 whether or not I would amend my complaint, which I did, and we  
20 submitted a second amended complaint. At that status  
21 conference, Mr. Conway brought up your Soc.Gen. decision from  
22 2010. A substantial focus of the briefing on the motion to  
23 dismiss and the focus at the mediation was, Do we have a claim  
24 under 10(b) for these ADRs, and the F-shares that are wrapped  
25 into the POA in this case, your Honor, they're not part of the

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1 second amended complaint. They were folded in, and there was a  
2 movant that claimed to have F shares and there are claimants  
3 who have F-shares. But basically in 2010, the Supreme Court  
4 issued the Morrison decision. Your Soc.Gen. decision came out  
5 shortly thereafter, I believe September of 2010, and if that  
6 were the end of it, our case would be dead under your analysis  
7 in Soc.Gen. Now, since that decision came out in 2010, the  
8 Second Circuit has two rulings that we argue support our  
9 position on the fact that the ADRs are domestic transactions  
10 under Morrison and that the Soc.Gen. decision is no longer  
11 consistent with the new guidance from the Second Circuit in the  
12 Park Central case and the Absolute Activist case. Those were  
13 some pretty interesting hot-button, new issues. We got some  
14 press. I think we even referenced an article in our papers.  
15 There was a lot of interest as to how this would be resolved,  
16 and it was definitely something that Judge Phillips pushed both  
17 sides on.

18 THE COURT: He is a retired federal judge, right?

19 MS. MILLER: That's right.

20 THE COURT: And practices now at a firm?

21 MS. MILLER: He has his own firm. He used to be at  
22 Irell & Manella and recently, in the past year, has opened up  
23 his own firm. It's also based in California.

24 THE COURT: I see.

25 MS. MILLER: But he often comes to New York for

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1 mediations, particularly if he's interested in the case, and in  
2 this case he was.

3 One other Grinnell factor to focus on, and again I  
4 think I mentioned it here, we didn't have just one but two  
5 heavily vetted economists who said, You know, your maximum  
6 number is 48.1. That wasn't just a number that we got from  
7 somebody the day before, to say, Oh, give us a number that's  
8 low so we can say that we got 25 percent. That was really a  
9 number that we were engaged in, vetted heavily, and had input  
10 from the other side and from Judge Phillips, etc. We think  
11 that that is really a terrific result, particularly in light of  
12 the legal uncertainties with the ADRs.

13 Just to turn briefly, if I might, if your Honor has no  
14 other questions about the settlement itself, to the plan of  
15 allocation. It's a pretty simple plan. It just really has two  
16 pieces on it, one for the ADRs and one for the F-shares, and  
17 the only difference there is the amount of the drop  
18 attributable to the alleged fraud; it's different in each case,  
19 because they were trading at different prices. That's really  
20 the only difference there. It's pretty straightforward, and  
21 our papers set out the details. The notice, of course,  
22 contains the entire plan of allocation. There have been no  
23 objections, and it conforms with Dura Pharmaceuticals: you have  
24 to hold until the end; there is only one drop in the case.

25 THE COURT: Would you address the significance of the

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1 response in terms of proofs of claim vis-à-vis other cases  
2 you've been familiar with.

3 MS. MILLER: Yes.

4 THE COURT: I'm not sure I know what to make of 6,725  
5 proofs of claim. Obviously it depends on how many people were  
6 eligible, but tell us about that.

7 MS. MILLER: Your Honor, a couple of points on that.  
8 So far around 6,700. Those are forms that have been returned,  
9 but what really matters is how many shares are covered about by  
10 those claims.

11 THE COURT: Are represented.

12 MS. MILLER: People have until May 5 to submit their  
13 forms.

14 THE COURT: Right.

15 MS. MILLER: Typically at this point we don't have  
16 available any numbers regarding how many damage shares are  
17 covered by those claims because there's an extensive and  
18 necessary vetting process. There's often duplicates.  
19 Mr. Azari can speak more to these issues, but Mr. Klug, our  
20 lead plaintiff, had some questions and he obviously has a  
21 vested interest in knowing how many other people are going to  
22 claim here, so we asked Epiq to do some preliminary research,  
23 and they had initially given us a number a few days ago that  
24 was 24 million shares are covered so far. Our experts estimate  
25 that there are 31 million damage shares. I should say expert;

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1 that was from Mr. Coffman. I was quite surprised that the  
2 number was that high and asked her to go back and see if she  
3 could find more information, and again this was very  
4 preliminary, not typically done, and the "she" I'm referring to  
5 is Stephanie Thurin, who has put in several declarations  
6 relating to steps in the administrative process. It turns out  
7 when they went back and took a closer look, because again this  
8 was before the vetting stage even begins, they discovered that  
9 20 million of those shares were purchased overseas, not a class  
10 member. We have, right now it looks like, about now 4 million  
11 damage shares out of a maximum of 30 million damage shares.

12 THE COURT: And more to come, so to speak?

13 MS. MILLER: In my experience, and I think this is  
14 also something that Mr. Azari can speak to more, you typically  
15 get a handful of big numbers at the end, and it's pretty busy  
16 toward the deadline for filing the proof-of-claim forms. With  
17 respect to your question, in my experience, there has been a  
18 lot of interest, a lot of claim forms submitted, a lot of  
19 damage shares covered, and that's part of the reason why you  
20 see the administrative expenses are higher than anticipated.  
21 And also with respect to the administrative expenses, I should  
22 point out that my firm sought competitive bids from eight or  
23 nine companies. We received bids from four companies.

24 THE COURT: For claims administration?

25 MS. MILLER: Yes. I'm sorry. Yes, claims



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1 administrators, and we were looking at two factors in selecting  
2 a bidder, not only price, but also competence and the ability  
3 to get this done right, because it is an incredibly important  
4 process. There was, I believe, one other claims administrator.  
5 It wasn't really an apples-to-apples comparison, but similar in  
6 price but not in reputation, and we felt it was very important  
7 to have a claims administrator that has a substantial  
8 background, and they know what they're doing. They have a ton  
9 of experience doing these cases, and that's why when I called  
10 them up and I said: 24 million damage shares doesn't make  
11 sense to me. I know you're trying to scurry around and give us  
12 some preliminary information so that we can talk to our clients  
13 about what's happening, but it doesn't seem right. And within  
14 24 hours, they had figured out what the problem was, and now  
15 it's more in line with what the expectations are. But I would  
16 say substantial interest.

17 With respect to your question about the exclusions --

18 THE COURT: Before you get to that, let's say it  
19 doesn't come out to be 4 or 5 million damage shares out of --  
20 you say 30?

21 MS. MILLER: We estimate about 31 million damage  
22 shares. In fact, that was in our initial draft of the notice,  
23 but not in the final notice that went out, because we  
24 streamlined it in accordance with your Honor's procedures.

25 THE COURT: How does that stack up percentagewise in

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1 terms of proofs of claim?

2 MS. MILLER: In terms of?

3 THE COURT: Well, participation in the settlement.

4 MS. MILLER: Right. Participation in the settlement  
5 is unusually high to date. For me probably one of the highest,  
6 and again, we have been surprised and pleased. It is higher  
7 than usual.

8 THE COURT: What's the metric or what's the norm?

9 MS. MILLER: There is not a norm. I would say  
10 depending on the case and the age of the case, cases that are  
11 more recently filed, such as this one, tend to have a more  
12 active response than older cases, although some of the very old  
13 cases have big institutional holdings, and sometimes there can  
14 be big recoveries there. But I just had a discussion with  
15 Stephanie Thurin about this earlier this week, and I also had a  
16 discussion with Chad Coffman about it, but in Stephanie's  
17 experience, and again Mr. Azari can speak to this further, she  
18 said somewhere between 20 percent and 50 percent is possible.  
19 She had one case that was 80 percent, and it was crazy unusual.  
20 I have seen cases with 10. That would be devastating. That's  
21 too low.

22 THE COURT: Got it.

23 MS. MILLER: If I might briefly speak to the  
24 exclusions, you had a question, which was, Did the exclusions  
25 that were not valid have an opportunity to address those

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1 issues. Actually, I think in one instance we had to track down  
2 a phone number and in the other a phone number was provided.  
3 We reached out to both but did not hear back from either, but  
4 it was very clear of the two one of them was plainly not  
5 ADR-subject; it was not a class member. And the other one  
6 seemed like it wasn't a class member, but we tried to reach out  
7 to that person and could not reach them. Yesterday, a late,  
8 well, a timely stamped exclusion came in from Canada. It took  
9 three weeks to get to us. A couple thousands shares had issued  
10 there. We actually just got in touch with that person today.  
11 It's the executor of an estate, and I just learned that, in the  
12 courtroom, because I had already left to go to court, that  
13 apparently the estate has already dealt with all of the  
14 financial issues and would have to be reopened to address what  
15 would potentially amount to around a thousand dollars, or so,  
16 so she didn't want to be involved in that process and, I guess,  
17 just sent that letter not understanding at the time that she  
18 didn't need to submit that letter and could have just done  
19 nothing. She doesn't intend to sue Tesco, so she wasn't opting  
20 out to preserve her rights. She just thought that she didn't  
21 want to have to deal with some paperwork and some funds and no  
22 place to put them.

23 THE COURT: Got it.

24 MS. MILLER: Your Honor, just briefly on class  
25 certification, we respectfully submit that the requirements of

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1 23(a) and (b)(3) predominance are met here, and that the class  
2 should be conditionally certified with Mr. Klug as the  
3 representative, who very vigorously and diligently oversaw the  
4 litigation, and although he wasn't in the room at the  
5 mediation, he was in touch throughout the day with my partner  
6 Lew Kahn and was, frankly, instrumental in the result that we  
7 received, which again we think is a terrific result here.

8 On the fee application, just a few points to make.  
9 Obviously we've addressed the Goldberger factors, all of them,  
10 in our brief, but just to focus in on a couple of things, as I  
11 think you've noted in the Elan case, and in our briefs we  
12 mentioned some other cases in the Second Circuit, when you're  
13 dealing with novel and complex issues, that increases the risk  
14 and the risk in the litigation versus the results obtained is a  
15 real focus under Goldberger. In addition to the issue that I  
16 mentioned with respect to the ADRs in Morrison, I would also  
17 say that this sort of dovetails nicely into one of the old  
18 Goldberger factors, which is the competence of your  
19 adversaries. We, of course, mentioned in our papers  
20 Mr. Conway, who I've gotten to know just a bit in this case,  
21 who is a lovely man but happens to be quite capable of  
22 defending his clients' position before the Supreme Court and  
23 got the ruling in Morrison and the opinion by Judge Scalia  
24 there, which we were vigorously debating the importance of in  
25 connection with Soc.Gen. and the more recent case law in the

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1 Second Circuit on those issues of extraterritoriality.

2 Also, the defendants had raised issues on *forum non*  
3 *conveniens*, and although we believe that we have a very strong  
4 argument there, they submitted a declaration from an English  
5 barrister supporting their position, so again, in addition to  
6 all of the standard fair arguments in a motion to dismiss in a  
7 10(b) securities case, which are in and of themselves difficult  
8 for plaintiffs to deal with, we had several unusual and  
9 different ones that are not typically of focus in a 12(b)  
10 motion in the early stages. And also, just to go back, in  
11 terms of complexity of the issues and our involvement of our  
12 forensic accounting consultant who helped us with the IFRS  
13 claims, there's a recent case cited in our papers, In re Fugit,  
14 in which Judge Batts addressed the fact that when you're  
15 dealing with accounting issues involving another country's  
16 application of the accounting laws there, that can be a  
17 substantially more complicated factor and readily supports a  
18 fee.

19 I would also say, your Honor, we noticed a fee of 30  
20 percent. We had a retainer agreement with our client for a  
21 third. We are seeking 20 percent here. It's a 2.13  
22 multiplier, as you said. And as you did all of the hard work  
23 for me in stating all the details, you, I believe, said our  
24 lodestar, and I'm not positive you said our lodestar, was  
25 \$1,127,995.50, approximately, and 1,840 hours. And I apologize

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1 for not submitting our time detail in advance. I brought it in  
2 today. Having read all your prior decisions, I should have  
3 submitted it before, and I apologize for that.

4 THE COURT: No problem.

5 MS. MILLER: I guess I just want to point out that the  
6 reaction of the class has been supportive and there's a lot of  
7 interest, and our expenses were noticed at 200,000, but they're  
8 just \$123,935.

9 Finally, turning more, and we talked about it briefly  
10 already, to the administration and the notice, your Honor, we  
11 respectfully submit that the notice that was issued complied  
12 with due process and included an understandable description of  
13 the case, and we worked, as your Honor may recall, to revise  
14 that notice and streamline it so that it was more accessible to  
15 the class members. I believe you said how many notice packets  
16 have gone out, and essentially, I wanted Mr. Azari to have an  
17 opportunity to address the Court in the event the Court has  
18 questions. The most recent submission on costs from Ms. Thurin  
19 indicates, I believe, they're at 245,000, but again, because  
20 there's been substantial interest in the settlement and more  
21 notice packets than anticipated, the costs are continuing and  
22 there's quite a bit more work to be done here to wrap this up.  
23 If there are any questions, especially since he came in all the  
24 way from the West Coast, maybe we could give him a moment to  
25 address the Court on the administration.

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1 THE COURT: Sure. Before we turn to that, I have one  
2 more question to you.

3 MS. MILLER: Yes.

4 THE COURT: Tell me a little bit about the discovery  
5 process here, including if there were depositions or if it was  
6 just documents up until now, and if there were depositions, how  
7 many, and that kind of thing.

8 MS. MILLER: Your Honor, there was document discovery  
9 only, about 10,000 pages, things like board and executive  
10 committee meeting notes and emails. That was about 10,000 or  
11 12,000 pages, and also, since we did not have the benefit of  
12 formal discovery prior to the decision on the motion, that was  
13 one of the reasons why we dug in hard on the investigation  
14 front, and we cite in the complaint one former high-level  
15 witness at the company who indicated that management was not,  
16 well, this is an allegation again, management wasn't insisting  
17 on compliance with certain rules and regulations with regard to  
18 the inventory practices. We were able to unearth that despite  
19 the fact that there was no formal discovery, but in connection  
20 with the settlement, we did get some documents confirming that  
21 the settlement is fair, reasonable, and adequate.

22 THE COURT: Great. Thanks. I would like to hear from  
23 the claims administrator just briefly.

24 MR. AZARI: Your Honor, I appreciate the opportunity  
25 to come into the court today. What specifically would you like

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1 to hear?

2 THE COURT: You can tell us just very briefly for the  
3 record what the claims process has entailed so far. That's  
4 just a factual summary, and then I'm going to ask, I think I  
5 know, but for the record how much your firm has rung up in  
6 expenses so far.

7 MR. AZARI: Sure.

8 THE COURT: And what your projection is to get us to  
9 the end of the process.

10 MR. AZARI: I think I can answer all but the last  
11 question. It's been a fairly typical securities case process  
12 where based on the shares involved in the case, we sent out  
13 notice to the standard list of brokers, dealers, nominees, and  
14 either requested that they provide us with names of holders so  
15 we could provide the notice to or they could go ahead and  
16 provide notice themselves. On that point initially the  
17 estimate anticipated about 50,000 notices would go out. To  
18 date we've mailed out, as you said, over 111,000, so getting to  
19 the differences in our initial cost projections, that's one of  
20 the primary drivers in a higher cost. Our per-claim package  
21 rate is, of course, the same as we said it would be, but with  
22 over 61,000 more notices sent out to date, that's been a big  
23 driver postissue.

24 Then the conversation about the claims received so  
25 far, echoing what counsel said, in our experience, the claims



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1 response has been very good, and with the filing deadline of  
2 May 5 still a couple of weeks away, it's our experience that we  
3 expect a bump in claims to come at the end, not only in volume,  
4 but also the larger value claims.

5 THE COURT: Institutional holders.

6 MR. AZARI: Yes. Those come in at the end of the  
7 process quite often, so we would be surprised if we did not  
8 exceed 20 percent -- if we did exceed, excuse me, 20 percent of  
9 the 30 million that are out there.

10 THE COURT: 6 million?

11 MR. AZARI: Correct. I think we'd be surprised if  
12 that didn't happen. In our estimation, this has gone very  
13 smoothly so far. We have an interest in everything going well  
14 just as much as everyone else, so we're very pleased in how  
15 things have occurred so far. For us, I know your Honor would  
16 like a firm-and-fast number; it really depends on how many  
17 claims come in the door. We have a per-claim price. We don't  
18 charge any hourly time over that. It's just that price per  
19 claim, and so shortly after May 5, we'll know.

20 THE COURT: You'll know.

21 MR. AZARI: We'll be able to come back and say, Your  
22 Honor, this is what it's going to be to finish this process.  
23 We'll still have a lot of work to do, process the claims.  
24 There will be defective claims. We'll have to send out letters  
25 to have those cured, go through that process, do our final

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1 calculations, and do the distribution, but we'll know what it's  
2 going to be once we have the total number back.

3 THE COURT: About two weeks, a little more?

4 MR. AZARI: A little more, because the one example of  
5 the really late-arriving opt-out, there's go to be a few claims  
6 that come in on May 15, something like that.

7 THE COURT: My policy generally has been with respect  
8 to that to be liberal and generous, unless it's absolutely  
9 obvious that it's a claim that should not be considered, but to  
10 bring them in under Rule 10.

11 MR. AZARI: Understood.

12 THE COURT: Great. Thanks.

13 MR. AZARI: You're welcome. Thank you.

14 MS. MILLER: Your Honor, just a couple final points.  
15 We submitted, and I'm sure you won't be needing it or using it,  
16 a form of order a couple months ago that didn't include some  
17 language that inadvertently got omitted, so we would like to  
18 resubmit to you a Word version of our most recent version, with  
19 our apologies.

20 THE COURT: Great.

21 MS. MILLER: And would you like to have our time  
22 detail handed up?

23 THE COURT: Yes.

24 MS. MILLER: OK.

25 THE COURT: This is an extra set?

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1 MS. MILLER: This is an extra set just for you. I  
2 didn't give this to the defendants.

3 THE COURT: This is the time sheets.

4 MS. MILLER: That's the time detail, and I can provide  
5 for your Honor by close of business Monday, if you like, the  
6 expense breakdown.

7 THE COURT: Sure. That would be great.

8 MS. MILLER: We'll just submit that on Monday.

9 THE COURT: Now that's the front table. How about  
10 from Mr. Conway?

11 MR. CONWAY: On behalf of defendant Tesco, your Honor,  
12 we think the settlement is fair, reasonable, and adequate in  
13 all respects, and unless the Court has any questions for us, we  
14 concur in the reasons set forth by the plaintiffs in their  
15 memorandum here today.

16 THE COURT: I do have a small question.

17 MR. CONWAY: Sure.

18 THE COURT: Do you have experience working with the  
19 judge in this case? Have you done mediations with him before?

20 MR. CONWAY: Judge Phillips. If you had to pick  
21 somebody who has the highest market share in this business, you  
22 would pick Judge Phillips, and he is highly respected by both  
23 plaintiffs' lawyers, by defense lawyers, and by insurance  
24 carriers. He's probably the most prominent of all the  
25 mediators in this space.

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1 THE COURT: Great. Anybody else? Should we hear from  
2 Mr. Klug at this point? Does anybody else want to be heard?

3 Yes, sir.

4 MR. KLUG: Thank you, your Honor. Your Honor, I have  
5 some brief written remarks that I'll read, and then you're  
6 certainly welcome to interrupt me while I'm saying those and  
7 ask any questions after I'm finished. As I said, my name is  
8 Stephen Klug, and I am the lead plaintiff in this case. I'm  
9 here today to object to plaintiffs' counsel request for  
10 attorneys' fees and seek your assistance in determining what  
11 fees might be appropriate.

12 I'd like to briefly share some background on me, which  
13 I believe shows I'm qualified to make the remarks I'm going to  
14 be making. I'm a 63-year-old retired father of three and  
15 grandfather of twelve. That has nothing to do with anything,  
16 but I just like to talk about my grandkids. I received a  
17 bachelor's and an MBA degree from Northwestern University in  
18 Evanston, Illinois, and a law degree *summa cum laude* from  
19 Cleveland State University. After practicing law for several  
20 years at Thompson, Hine & Flory in Cleveland, I returned to  
21 work at Progressive Insurance, where I started a program in  
22 conjunction with the American Bankers Association to provide  
23 director and officer liability insurance and fidelity bond  
24 coverage.

25 THE COURT: Slow down a minute. I'm not sure I got

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1 it. To provide?

2 MR. KLUG: Director and Officer liability insurance  
3 and fidelity bond coverage to ABA member community banks. I  
4 wrote the original D&O policy used in the program and created a  
5 culture in the program based on loss prevention and independent  
6 review of all claims submitted. That program was very  
7 successful, and it's still in operation today. In the early  
8 '90s, I started a new program at Progressive to write D&O  
9 insurance for companies undertaking an IPO. I later purchased  
10 this business from Progressive and subsequently sold it to  
11 General Reinsurance, now a subsidiary of Berkshire Hathaway.  
12 Like the ABA program --

13 THE COURT: Like the?

14 MR. KLUG: American Bankers Association program, ABA  
15 for short, the IPO business was focused on loss prevention and  
16 independent factual investigation of claims submitted. In  
17 short, I'm not a newcomer to securities litigation, although my  
18 career was clearly spent on the defense side. And while I'm  
19 not here to object to the settlement itself, I certainly don't  
20 think it's the great victory that plaintiffs' counsel would  
21 have us believe, and since this goes to the issue of the  
22 appropriateness of the fees requested, I'd like to share my  
23 views briefly. I believe the Tesco case was a very strong one  
24 for plaintiffs. In fact, had I been the D&O underwriters with  
25 Tesco's D&O policy, I would have reserved my limits. There's

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1 no doubt that fraud was committed, and the company has admitted  
2 as much. Throughout the case -- excuse me. Throughout the  
3 course of the case, counsel communicated to me that they shared  
4 this belief and that we would prevail on the jurisdictional  
5 challenge presented by defendants' motion to dismiss.

6 I consulted Kevin LaCroix, who is a personal friend  
7 and someone that I hired for our IPO business some 20 years ago  
8 to write the article that he wrote in the D&O diary, and I did  
9 that after Kevin confided to me that he believed that we had  
10 the superior legal argument. He did say, however, I might not  
11 be happy with the article because he has to try to be  
12 evenhanded, and he does have quite a few friends in the defense  
13 bar. But more than that, one week before the mediation,  
14 counsel emailed me that we should prevail on the jurisdiction  
15 issue unless the Court "will fail to apply the law correctly."

16 THE COURT: It happens.

17 MR. KLUG: And any time I give you quotes, I have the  
18 material. If you'd like me to submit it to the Court, I'd be  
19 happy to.

20 THE COURT: Sure.

21 MR. KLUG: So with this background in mind, I was  
22 shocked to receive communication from counsel attending the  
23 mediation that we would "probably lose" on the motion to  
24 dismiss and that I should authorize a settlement of \$9 million.  
25 Counsel further advised that should I approve that amount, they

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1 would "shoot to try to get you an incentive award." At the  
2 time, your Honor, I didn't know if I was being bribed to  
3 approve a settlement or what was going on. There had been no  
4 discussion of any incentive award whatsoever, but apparently  
5 counsel thought this might help in getting my agreement to  
6 approve the settlement. And here's where I made a big mistake.  
7 I should have simply said no settlement. Instead, I responded  
8 that I would not approve anything less than 12 million and went  
9 to bed thinking the case wasn't going to be settled. And I  
10 should say I went to bed because I was six time zones away.  
11 It's no excuse, but it was late at night, and that's how my  
12 mind was working at the time.

13 When I found out the next morning that the case had  
14 settled, I did not feel good. I felt terrible. Counsel  
15 advised me that I could not discuss the case with anyone until  
16 the settlement was announced, so I did nothing until then.  
17 Once the settlement was announced, I undertook my own  
18 investigation of other alternatives available to plaintiffs in  
19 the class. I discovered both the pending case in Ohio, which  
20 you referenced before, and the developing case in the U.K.  
21 being privately financed. I contacted counsel in both those  
22 cases and I determined that I could participate in either one  
23 of them if I opted out of this case. I called my counsel and  
24 advised them of what I'd learned and told them I was  
25 considering opting out of the case. They were not happy. I

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1 ultimately determined that since I had approved the 12 million,  
2 I should remain in the case. However, I strongly believed that  
3 our proposed notice to the class failed adequately to advise  
4 claimants that they had other potential avenues available if  
5 they wished to pursue them. Counsel agreed to present my  
6 concerns to you at the hearing on the notice, and they advised  
7 me of your comments.

8 At this point, your Honor, I would just like to ask if  
9 you recall that and if you could tell me what your comments  
10 were.

11 THE COURT: I don't recall exactly, but there is, I'm  
12 certain, a transcript of that entire proceeding, which I would  
13 refer you to. Even if I did recall, I'd say look at the  
14 transcript, because that would be the most definitive resource  
15 for what happened there.

16 MR. KLUG: I would certainly like both of us to look  
17 at that so we can just see for the record, because in my mind,  
18 it seemed that you can hardly make a decision in a case like  
19 this that doesn't work for the benefit of all the members of  
20 the class in giving them the greatest amount of disclosure.

21 THE COURT: Just on that point, and it's a general  
22 point, but in my mind, there's always a tension between a  
23 24-page, single-spaced document that lawyers only could perhaps  
24 understand what is being said and a more user-friendly or  
25 shareholder-friendly one, which might contain maybe less



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1 detail, so I'm always trying to strike a balance between when  
2 the individual gets the former, the 24-page, single-spaced  
3 document. I don't know how many people actually sit down and  
4 read those and understand those, etc.

5 MR. KLUG: Yes, your Honor. I certainly agree, but I  
6 can't imagine a more important point for someone considering  
7 whether or not to participate that there might be other  
8 available options for them to pursue, even if it was simply a  
9 sentence with a website or a telephone number.

10 In short, this is tied to another issue, your Honor,  
11 that I pursued during the course of this litigation. I was  
12 aware of the Morrison issue, if you will, and aware of the  
13 risks we had on the motion to dismiss, and I continuously said  
14 to counsel: What if we lose? What are we going to do? Where  
15 are we going to go? Can't we go to the U.K.? And I was told  
16 primarily, Don't worry, we're not going to lose; but if we do,  
17 we'll worry about that when the time comes. In retrospect, I  
18 believe that if counsel had prepared a comprehensive plan that  
19 included a contingency plan for an action in the U.K., if we  
20 were to lose the jurisdictional argument, that defendants would  
21 have settled for more or we could have prevailed in the  
22 alternate form.

23 THE COURT: In the U.K.

24 MR. KLUG: In the U.K. And I think one of the reasons  
25 why I'm critical of plaintiffs' performance and thus its

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1 request for its fees is that I believe they looked very  
2 narrowly, only in the U.S., not beyond the U.S., and that hurt  
3 us, quite frankly.

4 I also believe counsel's been less than forthcoming  
5 regarding comments made in their brief regarding the fee  
6 application. On page 23 of the brief, they state that "to date  
7 not a single objection has been filed challenging either the  
8 settlement or lead counsels' fee and reimbursement request up  
9 to 30 percent of the net settlement fund." Your Honor, I sent  
10 them an email as soon as I received the notice that said not  
11 only would I not support 30 percent, but if they asked for  
12 anything more than 20 percent, I would come to this hearing and  
13 object and bring an expert witness. So I think that's quite at  
14 odds with the impression that was given in the brief filed with  
15 you. At this point you may be saying to yourself: Why the  
16 hell are you here? You got your 20 percent.

17 THE COURT: I'm not saying that.

18 MR. KLUG: You might, I said. And here's why, your  
19 Honor. When I look at the totality of the documents that were  
20 filed and the impression that it gave of this rah-rah team on  
21 our side that was all very happy with what happened, that's  
22 quite at odds with my view of the case. I believe, frankly,  
23 that my attorneys wanted to settle the case to lock in a pretty  
24 good fee at a time that was very good. This has got to be  
25 among the shortest in duration of most securities class action

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1 lawsuits that I'm familiar with.

2 I guess in conclusion, I personally lost \$900,000 on  
3 my Tesco investment and stand to recover, and my numbers have  
4 varied quite a bit, anywhere between 45 and \$70,000, while  
5 counsel could walk away with a fee of 2.4 million. And just on  
6 a final note, and I will defer to your judgment totally on  
7 this, but when I viewed counsels' hourly fees, I found them  
8 very hard to take, especially the one lawyer who spent the  
9 equivalent of 16.2 weeks full time working on a case that  
10 involved filing a complaint, a response to a motion to dismiss,  
11 and attending a hearing. It's conceivable, and this supports  
12 my view of why plaintiffs' counsel might have wanted to settle  
13 so quickly, if they were burning through the money that quickly  
14 on that little bit of litigation, I mean, there's no way they  
15 could have supported this case to go through trial.

16 Anyway, that's all I have. I propose that counsel be  
17 awarded fees equal to no more than their actual costs after  
18 your consideration of their cost summary.

19 THE COURT: You mean their actual billings?

20 MR. KLUG: After you consider the billings and deem  
21 them to be appropriate.

22 THE COURT: I see. I hear you. That's the bottom  
23 line of what you're saying.

24 MR. KLUG: Yes, your Honor.

25 THE COURT: OK. Fair enough.

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1 MR. KLUG: Thank you.

2 THE COURT: I appreciate that.

3 Do you want to respond?

4 MS. MILLER: I would like to, your Honor, make a  
5 couple comments. Your Honor, I did not know that Mr. Klug was  
6 going to object to the fee today. I knew that he wanted to  
7 speak. He indicated that he was going to come up here. I  
8 respect his concerns and views. I just want to point out a few  
9 things. He did approve the settlement. He was involved in the  
10 settlement.

11 THE COURT: OK, but before you get to that, I also  
12 respect his views and I think it's helpful and I'm glad that he  
13 did come.

14 MS. MILLER: Yes.

15 THE COURT: Sometimes, perhaps even often, we have a  
16 fairness hearing and nobody comes, so it's an interesting  
17 perspective, especially since he had such a substantial loss.

18 MS. MILLER: He does have a substantial loss. Sorry.

19 THE COURT: That's all.

20 MS. MILLER: He does have a substantial loss, your  
21 Honor. As we were addressing, I mean, we had substantial  
22 discussions with him between the time the settlement was agreed  
23 to and today. I did not recall his precise out-of-pocket loss,  
24 but his recognized loss under the plan of allocation required  
25 by Dura is well under 300,000, and we had one of our economic

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1 consultants prepare a memo for him that said if 10 percent  
2 claim, you get this; if 20, this; if 50, this. And so he had  
3 an understanding that the amount of money that he got was  
4 dependent on how many people claimed and also that there are  
5 legal limitations here on what is recoverable because of Dura  
6 Pharmaceuticals.

7           Regarding the notice issues, at the preliminary  
8 approval hearing, I did indicate to you that my client had  
9 three questions for you, and I think I indicated that I wasn't  
10 sure that I really wanted to ask them, but I felt compelled  
11 because my client wanted me to ask them. They related to  
12 whether the notice should include language about the Ohio case  
13 that was pending and whether we should include language that  
14 people could proceed potentially overseas, and there was one  
15 more question. I don't remember it. The notice and the  
16 summary notice both referred to the Ohio case.

17           We did get contacted by the firms that he spoke to in  
18 the U.S., including lawyers who were considering litigation in  
19 the U.K. Unfortunately for Mr. Klug's potential claims in the  
20 U.K., the potential case that has not yet materialized in the  
21 U.K. involves securities that are not the ADRs that are covered  
22 by this case. And of course, as we noted in our motion to  
23 dismiss opposition briefing, if we were to proceed in the U.K.  
24 with respect to these claims, there's no class action mechanism  
25 and we would be proceeding under a tort theory on an individual

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1 basis, and it's incredibly difficult to get discovery in the  
2 U.K. under those parameters. But anyway, we did state that  
3 there was such a case, and we prepared a memo for Mr. Klug  
4 regarding the issues that are sort of addressed in the motion  
5 to dismiss briefing on the *forum non conveniens* issues, and I  
6 think it speaks volumes that there is not a case; that although  
7 there were many press releases and different firms involved in  
8 trying to gather potential clients for litigation over there,  
9 nothing has been served on the defendants as of a few days ago  
10 when I last asked for an update from Mr. Conway on that issue.

11 I guess the privilege has sort of been thrown open  
12 there. If your Honor would like to see all of our  
13 correspondence, I'm happy to provide it. I think that the  
14 email and telephone discussions, I think I was involved in one  
15 phone call with Mr. Klug, but my partner, Lew Kahn, was his  
16 main contact, and I've seen many but not all of the emails and  
17 have been briefed on some of the discussions but not involved  
18 in all of them, and my understanding was that he supported the  
19 settlement and was coming today. I knew that he had requested  
20 that we limit our fee to 20 percent, and so I thought that that  
21 had resolved the problem.

22 I do just want to say that since it is unusual to have  
23 this sort of thing pop up without any forewarning, that I  
24 strongly stand by the settlement and I strongly stand by the  
25 work performed by my firm and I strongly stand by the arguments

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1 made in our papers regarding the risks faced in this case and  
2 the likely outcomes, and I think Mr. Klug stands to get a very  
3 solid result participating in the settlement. And I admire his  
4 coming here and making this statement, and he obviously has  
5 very strong feelings, and he was a terrific plaintiff. And  
6 frankly, the class would not have as much money as it got if it  
7 had not been for his involvement. Thank you.

8 THE COURT: OK.

9 MR. KLUG: Excuse me, your Honor. I just have to  
10 reply. And the most important one is the issue as to whether  
11 or not the ADRs would be covered under the financial  
12 institution act in Great Britain, which, by the way, has a  
13 slightly lower standard of proof, as I recall, than actions  
14 under 10b-5. But in any event, I contacted counsel in the U.S.

15 THE COURT: You mean other counsel.

16 MR. KLUG: Yes. Their name is Scott & Scott, and they  
17 were the ones with the website saying, If you have an ADR come  
18 with us; we're doing this litigation in Europe. I said, My  
19 folks tell me we can't do that. They said, Nope, we've done  
20 the research and you can. So I sent counsel a copy of that  
21 opinion and they came back to me not with results of their  
22 research indicating whether or not that was possible but with a  
23 cite to defendants' expert who had concluded that that would  
24 not be possible because in his opinion the NASDAQ market was an  
25 unregulated securities market. Now, your Honor, if you Google

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1 "regulation" and "NASDAQ," you don't have to be much of an  
2 expert to see that NASDAQ is heavily regulated, so I have  
3 dismissed that argument out of hand, and apparently Scott &  
4 Scott didn't feel much of it, but I got no original research  
5 from my own counsel. All I got, and it's sort of interesting  
6 that they're all of a sudden relying on affidavits provided by  
7 the defense.

8 Anyway, as to the pendency of what's going on in Great  
9 Britain, I think that the counsel over there is very prudently  
10 awaiting the results of the government investigation into the  
11 fraud.

12 THE COURT: Of the U.K. government?

13 MR. KLUG: The U.K. government. The U.K. government,  
14 and Mr. Conway would know the name of the office better than I  
15 do that's actually doing the investigation, but essentially,  
16 they will hand this action over to counsel, having been fully  
17 vetted by the British government. So that's the only thing  
18 that's holding that case up. Thank you.

19 THE COURT: My understanding is that the settlement of  
20 \$12 million, perhaps with reluctance, but you have approved  
21 that, because that is the number that you gave to counsel as  
22 your cutoff, right?

23 MR. KLUG: That's correct.

24 THE COURT: That's No. 1. And two, what you want me  
25 to do, which, by the way, I intend to do, I think I said it



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1 even before you stood up, I'm not yet ready to approve the  
2 legal fee aspect because I haven't reviewed the time sheets in  
3 particular, and so you want that not to exceed 20 percent of  
4 the 12 million. Is that right?

5 MR. KLUG: No, your Honor. Upon further reflection, I  
6 don't want it to exceed the lodestar itself.

7 THE COURT: Oh.

8 MR. KLUG: If you say it's 1.1, give them the 1.1.

9 THE COURT: OK.

10 MR. KLUG: If it's less than that, less than that.

11 THE COURT: Got it. I thought you had said 20 percent  
12 was your goal. I think you maybe said that earlier, but then I  
13 think you did indeed say that they should be paid the lodestar.

14 MR. KLUG: Thank you.

15 THE COURT: Fair enough.

16 Mr. Conway, did you want to get the last word?

17 MR. CONWAY: Ordinarily, I wouldn't be saying anything  
18 here. I certainly don't take a position on the appropriateness  
19 of the fee request.

20 THE COURT: I hope you don't feel that from the Court  
21 there's any constraint not to say anything.

22 MR. CONWAY: Other than to say I'm glad Mr. Klug's not  
23 reviewing our fees. In terms of the merits, I only want to  
24 speak to the merits to the extent that Mr. Klug said this was  
25 some kind of a slam-dunk case. The plaintiffs have to show and

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1 have to plead scienter, and for a corporation that means they  
2 have to plead and ultimately prove at trial that people at a  
3 certain level, the highest level, of the corporation actually  
4 knew about these overstatements. The fact that there was an  
5 overstatement by itself does not suffice.

6 In terms of the cases that Ms. Miller talked about,  
7 Absolute Activist and Park Central in the Second Circuit, we  
8 don't think there's any inconsistency between those cases and  
9 your Honor's decision in Soc.Gen. In particular, Absolute  
10 Activist is completely irrelevant.

11 THE COURT: Too fast. After Soc.Gen., you then said?

12 MR. CONWAY: We don't think there's any inconsistency  
13 between Soc.Gen. and the two decisions of the Second Circuit  
14 that Ms. Miller spoke about. Absolute Activist is completely  
15 irrelevant, and Park Central is a case that actually confirms  
16 that the fact that you have a transaction that is domestic and  
17 occurs in the United States does not eliminate the presumption  
18 against extraterritoriality. A transaction still can be not  
19 beyond the reach of Section 10(b) even if physically it takes  
20 place in the United States, a claim can be beyond the reach of  
21 Section 10(b) In terms of the *forum non* argument we made, Mr  
22 Klug has essentially conceded because he admits that a claim  
23 could be brought in the U.K., and there is absolutely no  
24 dispute here that all the evidence, all the witnesses that  
25 matter are in the U.K., so the plaintiffs here were at

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1 substantial risk on the motion to dismiss, and that counsels in  
2 fair of approving a settlement that's fair reasonable and  
3 adequate in all respects Thank you.

4 THE COURT: I have one comment and one question.

5 MR. CONWAY: Yes.

6 THE COURT: The comment, of course, is that it's  
7 pretty clear, and everybody here understands, that the motion  
8 to dismiss was never resolved by me because the settlement  
9 occurred at the time it was pending. But could you just  
10 briefly tell us what the status is. Is there any litigation in  
11 the U.K. against your client? Briefly address Mr. Klug.

12 MR. CONWAY: Not yet, your Honor, but there's been  
13 plenty of publicity by both the United States and U.K. counsel  
14 and litigation funders trying to put together a group that  
15 could still bring a civil case, and it may very well be as Mr.  
16 Klug says that they're awaiting the outcome of the  
17 investigation being conducted by the U.K. serious fraud office.  
18 There is no question that there are people in the U.K.  
19 threatening a lawsuit, and that could very well come to pass.

20 THE COURT: Thank you.

21 MR. CONWAY: Thank you, your Honor.

22 THE COURT: I think that brings us to a close. This  
23 has been a very helpful fairness hearing, actually, and I  
24 appreciate counsel, and I appreciate Mr. Klug's comments as  
25 well. I will take them all into consideration. It's very

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1 likely, incidentally, what I will do is since we're so close to  
2 the May 6 date is wait until we have the whole package. We'll  
3 know all the claims at that time, so I probably won't issue  
4 anything before then. I don't know if you want to come back  
5 after May 6 and tell me the final results or send me a letter,  
6 which would include the claims administrator fee and also the  
7 number of claims ultimately. I don't know if you need a little  
8 more time -- you probably do -- after May 6 to clean this up,  
9 but to me that sounds like a sensible way since we're so close  
10 to that date anyway.

11 MS. MILLER: Yes, your Honor. The date is May 5, and  
12 I have to ask Mr. Azari. At that point you'll need more time  
13 to know what your fees are going to be?

14 MR. AZARI: We'll need to allow enough time for all  
15 the claims to come in the door.

16 MS. MILLER: There's probably going to be a handful of  
17 late claims.

18 THE COURT: Is two weeks after that date enough, do  
19 you think, or what?

20 MR. AZARI: It should be. I mean, I can't imagine  
21 that it would differ by a few, maybe something straggled in,  
22 one or two, that's not going to be a substantive difference.

23 THE COURT: I'll aim for May 24. How is that?

24 MS. MILLER: May 24.

25 THE COURT: If you could, let me know by letter, if

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1 you would, just these loose ends, not very many of that, what  
2 they are. Is that fair.

3 MS. MILLER: We were going to give you the proposed  
4 order now. Would you still like us to?

5 THE COURT: Yes.

6 MS. MILLER: And the expenses now, and then we'll send  
7 you an update thereafter.

8 THE COURT: That's fine.

9 MS. MILLER: Thank you.

10 THE COURT: Again, very helpful today. I really mean  
11 that, and nice to see you all.

12 MR. CONWAY: Thank you, your Honor.

13 MS. MILLER: Thank you, your Honor.

14 (Adjourned)  
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